

NO. 82-1798

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

LOUIS E. DRIGGERS, et al.,

Petitioners,

v.

SOUTHERN COOPERATIVE
DEVELOPMENT FUND, et al.,

Respondents.

REPLY TO OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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ARGUMENTS IN REPLY

1. The Court should review the federal constitutional and statutory issues because they are the principal issues of the appeal and the remedies under the federal claims have a substantially greater impact on the petitioners than any remedy under state law.

Respondents claim that the Court should not review this case because state claims under the Florida Constitution and Florida law provide an independent basis for the district and appeals courts' judgments. However, the petitioners will also face a substantial penalty in terms of damages and attorneys' fees under the federal claim, based on §1983, that they would not otherwise be subject to under the state claim. The practical effect of the remedies afforded by §1983 threatens the exercise of local government power to issue subdivision plats and creates the substantial constitutional issue under which Driggers, et al. have brought their petition.

It has been well recognized by this Court and by scholarly commentators that the threat of more

damages under a §1983 action has and was intended to have significant effect on governmental behavior. In Owen v. City of Independence, Missouri, 100 S.Ct. 1398 (1980), the Court noted that "...§1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." 100 S.Ct. at 1416. See also, Note, Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133 (1977). Other, more negative, effects of municipal liability have been noted, including the potential for governmental intimidation and paralysis in the exercise of its duties, brought on by the fear of ruinous judgments.

See Owen v. City of Independence, Missouri, supra (dissenting opinion by Powell); Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922 (1976).

The availability of money damages has been further extended by this Court's decisions narrowing municipal immunity, and by the availability of attorneys' fees. In contrast, state laws rarely provide a

similar type of remedy, and there is no similar statutory remedy in Florida. Except in the case of a claim of an unconstitutional "taking" of property, the normal remedy in such a case would be injunctive relief.

Should the decisions of the court of appeals and the district court in this case be allowed to stand, it is apparent that any state claim will always be eclipsed by the federal claim under §1983. This will be especially true where the state claim is based on identical constitutional claims of due process, as in this case. Respondents therefore ask this Court to ignore the very real and practical effects of the decisions in this case on local government land use decisions by refusing review based on an independent state claim.

2. The case must be reviewed under the standards established for a due process claim and not a claim based on discrimination.

The respondents have presented their arguments in this case, although raised in a summary judgment motion based on constitutional due process claims, as though the issue is an equal protection

claim. Thus, the response in opposition elaborates for five of its nine pages on the alleged "selective" actions of the petitioners in their supposed "racial discriminatory" denial of a subdivision application. Any claims of equal protection violations in this case should be adjudicated not by intimation under a due process claim, but forthrightly in trial on equal protection counts. Otherwise, the due process claim will swallow the equal protection claim and create an even more expansive use of §1983 in future action before the Court.

This Court has recognized a distinct difference in the constitutional tests under which an equal protection violation, as opposed to a due process violation, must be found. In Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977), this Court decided that proof of intent to discriminate is necessary in order to show a violation of the equal protection clause. The Court reiterated that judicial review of the constitutionality of official action requires a showing of arbitrariness.

...[I]t is because legislatures and administrators are properly concerned with balancing numerous competing considerations that

courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.

429 U.S. at 265.

The district court took no evidence in regard to discriminatory intent, and in fact made no finding as to any alleged selective or discriminatory application of the subdivision regulation by the petitioners. Instead, the district court decided on a summary judgment motion that the petitioners' stated reasons for rejecting the subdivision plat exceeded their county powers, as the district court narrowly interpreted those powers.

It is this decision on the due process claim that petitioners argue is inappropriate for consideration under 42 U.S.C. §1983. The denial of a subdivision plat through the misapplication of state law is not the kind of substantive due process violation intended to be, or appropriate to be, included within the reach of §1983.

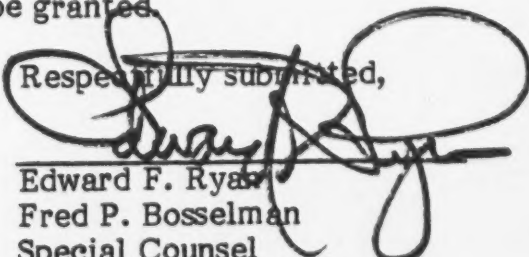
As suggested in Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir. 1982), cert. denied, 103 S.Ct. 345 (1982), stricter scrutiny of local administrative actions would be justified under §1983 where

invidious discrimination is involved. However, in such situations, evidence should be taken and discrimination should be proved, not intimated. The petitioners here should not be unfairly burdened with uproven charges of discrimination when the issue before this Court is the proper scope of §1983 in a substantive due process claim.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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